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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 13 2010
SRC 08 013 50981

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a senior engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director did not contest that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence, some of which is already part of the record of proceeding. While we withdraw the director's unexplained conclusion in the initial decision that the petitioner does not work in an area of intrinsic merit, we uphold the director's ultimate conclusion that the petitioner has not demonstrated that a waiver of the alien employment certification process would be in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. degree in Engineering from the University of Akron. The petitioner's occupation, a senior engineer for BD Medical, falls within the pertinent statutory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

As noted by counsel, in the initial decision, the director concluded without explanation that the petitioner does not seek to work in an area of intrinsic merit. The petitioner works in liquid crystalline polymer (LCP) design and investigation. The record contains media coverage confirming that these polymers have many commercial applications in aerospace, electronics and health. Thus, we are persuaded that the petitioner works in an area of substantial intrinsic merit. We concur with the director that the proposed benefits of the petitioner's work, improved medical devices, would be

national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

On appeal, counsel submits evidence about the reputation of the petitioner's employer. Nothing in the statute, regulations or *NYSDOT,* 22 I&N Dec. at 215 suggests that there are employers whose reputations alone warrant a waiver of the alien employment certification process for every alien they wish to hire. We are not persuaded that Congress intended the waiver as a blanket waiver for every distinguished employer.

The petitioner also submits evidence regarding the importance of the catheters on which he works. Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted evidence that he is a member of the Materials Research Society (MRS). The letter from [redacted] MRS Member Services Representative, indicates that members must be "actively engaged in work relating to the research and development of advanced materials or materials processes." [redacted] does not suggest that membership is indicative of influence in the field. Significantly, professional memberships are one type of evidence that can be submitted to support classification as an alien of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(E). By statute, however, "exceptional ability" is not, by itself, sufficient cause for a national interest waiver. Section 203(b)(2)(B)(i); *NYSDOT,* 22 I&N Dec. at 218. Thus, submitting evidence that relates to one criterion, or even the requisite three evidentiary criteria, for that classification does not warrant a waiver of the alien employment certification in the national interest. *Id.* at 218, 222.

The petitioner also submitted two published articles. While published articles may demonstrate exposure of the petitioner's work, it does not necessarily demonstrate the influence of that work. On motion, the petitioner submitted a single citation of one of her articles. While the citation predates the filing of the petition, a single citation is not indicative of a significant influence on the field as a

whole. Thus, we concur with the director's conclusion in the final decision that the petitioner's publication record is not persuasive evidence that the alien employment certification should be waived in the national interest.

In addition, the petitioner submitted evidence that he has reviewed manuscripts for *Polymer Engineering & Science*. [redacted] an assistant professor at the University of Southern Mississippi, asserts that the editorial board of this journal strictly selects the reviewers. We note that there are numerous peer reviewed journals that all rely on many volunteers to review the large number of manuscripts submitted. The petitioner has not demonstrated that *Polymer Engineering & Science* relies on a small number of credited elite reviewers or submitted other evidence confirming that participating in the widespread peer review process demonstrates the petitioner's influence in the field.

On motion, the petitioner submitted an invention disclosure record for an inventive concept completed July 15, 2008, after the filing of the petition. The petitioner must demonstrate his eligibility as of the filing date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). In this matter, that means that he must demonstrate his track record of success with some degree of influence on the field as a whole as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his as of yet incomplete inventive concept will subsequently be disclosed, patented and prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008). Even if we considered this disclosure, whether a specific innovation serves the national interest must be decided on a case by case basis. *NYSDOT,* 22 I&N Dec. at 221, n.7.

The remaining evidence consists of reference letters. On appeal, counsel asserts that the director did not read or understand the letters. Counsel states:

> First, [the petitioner] is the first scientist to synthesize PSHQ4-7CNCOOH, a completely new liquid crystalline polyester polymer with combined main-chain and side-chain liquid crystalline structure design. By virtue of this fact, it is obvious that [the petitioner] accomplished something more significant [than] other members of the profession with similar credentials and conducting similar work, since no other scientist has been able to accomplish this feat. Second, the [petitioner] has submitted a number of letters from those who do not personally know [the petitioner].

(Emphasis in original.) We will consider the letters in depth below. At the outset, however, we reiterate that original innovation, by itself, is insufficient. *Id.* Each innovation will be evaluated on a case by case basis as to its demonstrated influence in the field. Significantly, the Department of Labor's Occupational Outlook Handbook, http://www.bls.gov/oco/ocos027.htm (accessed April 1, 2010 and incorporated into the record of proceedings), states that it is the nature of materials engineering to create and study new materials. While counsel stresses that the petitioner is the first engineer to synthesize a specific polymer, counsel is not persuasive that this fact separates the petitioner from other materials engineers who, while they have not synthesized this specific polymer, have likely synthesized other materials. Research work that is unoriginal would be unlikely to secure an engineer a master's degree or warrant a patent or publication in a journal. Novelty in and of itself, is insufficient without evidence of the influence of that original work.

At the University of Akron, the petitioner worked in the laboratory of [redacted]. The petitioner did not submit a letter from [redacted] explaining the nature of the petitioner's contribution to their joint work. The petitioner did submit a letter from another member of the faculty at the University of Akron, [redacted]. [redacted] affirms that the petitioner synthesized PSHQ4-7CNCOOH, "a totally new LCP with combined main-chain and side-chain liquid crystalline structure" that is "in very pure and stable nematic mesophase." [redacted] explains that the petitioner's polymer "is of potentially great importantance [*sic*] to technological applications such as alignment layers in liquid crystal displays (LCDs) to obtain high pretilt angles." [redacted] further asserts that the petitioner's work "bridges the gap between the theoretical study, application and development of combined main-chain and side-chain LCPs." Finally, [redacted] concludes that the petitioner's "stunning achievements will be a milestone in the near future research and design of both LCPs and other new functional polymer materials." [redacted] does not, however, provide examples of new lines of research that have arisen due to the petitioner's influence.

[redacted], an associate professor at Case Western Reserve University in Cleveland, Ohio, explains that there has been a growing demand for high barrier packaging materials. While LCPs have low gas permeability, as explained by [redacted], one of the challenges with these materials is that they need to have a reasonably low melting temperature. According to [redacted], the petitioner "did not follow traditional methods in design and synthesis" in developing a new polymer. The resulting polymer, [redacted] explains, "has not only a low clearing temperature, but also a very stable glassy mesophase without any crystallization behavior over the very wide temperature range (90°C)." [redacted] concludes with several reasons why the petitioner works in an important field but does not explain how the petitioner's results are already being used in the field.

[redacted], a distinguished professor at Purdue University and a member of the National Academy of Engineering, acknowledges that he previously worked at the University of Akron but asserts that he knows of the petitioner's work through his publications. [redacted] characterizes the petitioner's work as "absolutely revolutionary" and concludes that the petitioner has "significantly advanced the field of LCPPs from the basic theory to final practical processing stage." While we do not question [redacted]' sincerity and expertise, he does not sufficiently support his conclusions with

examples of how the petitioner's work has already been applied. It can be expected that work that is "revolutionary" and that has "significantly advanced the field" would have garnered some independent attention in the field beyond solicited letters in support of the petition and a single citation that acknowledges the petitioner's work but concludes that it does not "directly address [thermotropic LCPs], where improved basic understanding would be of the most practical benefit."

[redacted], a principal scientist at [redacted] in Ohio, discusses the petitioner's collaboration with that company. This letter, however, does not demonstrate the petitioner's influence beyond the state where he was studying for his Ph.D.

[redacted], the petitioner's manager at BD Medical in Utah, asserts that the petitioner is "leading research and development activities around advanced compounding extrusion methods for the polyurethane elastomers utilized in BD's new-generation *BD Nexiva™ Closed Intravenous Catheter System.*" While [redacted] speculates that the petitioner's team "will identify potential solutions to many serious and unsolved problems," he does not explain how the petitioner's work has already become influential. [redacted] notes that the petitioner's contributions to BD Medical are documented in confidential technical reports and invention disclosures. The invention disclosure provided, however, postdates the filing of the petition and, thus, cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. In discussing the petitioner's previous work at the University of Akron, [redacted] concludes that the knowledge gained from this research "has great potential for future design and development of other functionally-oriented polymer materials" but provides no examples of industrial or academic teams pursuing such work based on the petitioner's results.

[redacted] of the Technology Commercialization Office at the University of Utah, asserts that the petitioner is a "real pioneer on new property-oriented design, synthesis and rheology investigation of combined main-chain and side-chain liquid crystalline polymer, and is the first one, as far as I am aware, to report a real glassic combined main-chain and side-chain liquid crystalline polymer in both thermotropic and lyotropic states." [redacted] further asserts that the petitioner "is the first person to experimentally demonstrate the mesogen tumbling of a synthetic liquid crystalline polymer." As stated above, however, original innovation, by itself, is insufficient. *NYSDOT,* 22 I&N Dec. at 221, n. 7. In addressing the applications of the petitioner's work, [redacted] provides only speculations. For example, [redacted] speculates that applying the petitioner's work to optical limiting devices could increase the performance and lower the cost of using such devices "in the potential application of sensor and eye protection." [redacted] further speculates that the petitioner's results "can be extended to many traditional polymer materials for producing more stable medical devices." While the petitioner is working on such projects at BD Medical, the record lacks evidence that BD has finalized any products based on the petitioner's work and, in fact, the only invention disclosure relating to the petitioner's work in the record postdates the filing of the petition.

The opinions of experts in the field are not without weight and have been considered above. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions

statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of talent, originality and vague claims of contributions without specifically identifying how those contributions have already influenced the field. Merely repeating the language of the legal requirements does not satisfy the petitioner's burden of proof.[1] While the petitioner did submit independent letters, these letters do not suggest the authors have applied the petitioner's work and provide no examples of independent research teams that have done so. The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to present some benefit if it is to receive funding and attention from the scientific community. While the petitioner's research clearly has practical applications, it can be argued that any Ph.D. thesis or published article, in order to be accepted or published, must offer new and useful information to the pool of knowledge. The record lacks evidence of the petitioner's influence in the field such that a waiver of the alien employment certification is warranted in the national interest.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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[1] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. (D.C. Dist. 1990).

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.